STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Hoekstra, P.J., and K.F. Kelly and Beckering, JJ.)

HEATHER LYNN HANNAY,

Plaintiff / Appellee

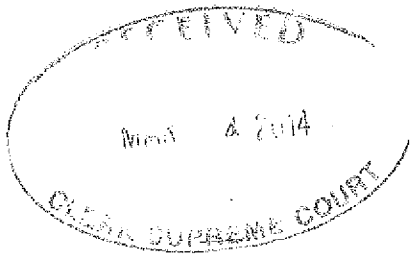
vs.

DEPARTMENT OF TRANSPORTATION,

Defendant/Appellant.

Supreme Court Docket No. 146763
Court of Appeals Docket No. 307616
Court of Claims Case No. 09-000116-MZ

AMICUS CURIAE BRIEF BY MICHIGAN TOWNSHIPS ASSOCIATION AND THE COUNTIES OF MACOMB, OAKLAND AND WAYNE



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STATEMENT OF BASIS OF JURISDICTION

This Court has requested briefing on the issue of "whether economic loss in the form of wage loss may qualify as a 'bodily injury' that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception to governmental immunity, MCL 691.1405 (see *Wesche v. Mecosta Co. Rd.* Comm'n, 480 Mich. 75 (2008))"[1]

As affirmed by the Court's order, the jurisdictional principle of governmental immunity that adheres in Michigan,[2] mandates that the issue must be confined to the scope of damages available to Plaintiff under the motor vehicle exception, only.[3] Otherwise, jurisdiction over the cause of action[4] and the remedy[5] is lacking. "Statutory consent to be sued merely gives a

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[1] Issue 2 in the Court's order is not restated here because the arguments presented by *amicus curiae* focus on Issue 1 and, as asserted herein, the disposition of this issue precludes consideration of Issue 2.

[2] Subject-matter jurisdiction over suits against the government can be exercised only under the exceptions in the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*. *Mack v. City of Detroit*, 467 Mich. 186, 198, 202-203 (2002); *Ballard v. Ypsilanti Township*, 457 Mich. 564, 567-69 and 573-76 (1998); *Ross v. Consumers Power Co.*, 420 Mich. 567, 596-597, 618 (1984).

[3] This is because the GTLA is the *only* expression of the People's consent to waive suit immunity and allow jurisdiction to be exercised by a court of law over the government. See *Scheurman v. Dep't of Transportation*, 434 Mich. 619, 636, n. 28 (1990). "In Michigan, the governmental immunity act is the vehicle that provides safeguards against unwarranted liability." *Id.*

[4] As it has been stated, the state created the courts and so is not subject to them absent express consent of the People through legislative waiver of their inherent immunity. *County Rd. Ass'n of Mich. v. Governor*, 287 Mich. App. 95, 118 (2010), citing *Pohutski v. City of Allen Park*, 465 Mich. 675, 681 (2002). See also *Sanilac County v. Auditor General*, 68 Mich. 659, 665 (1888).

[5] "It being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred *any limitation it chose*." *Atkins v. Suburban Mobility Authority for Regional Transp.*, 492 Mich. 707, 714, n. 11 (2012) (emphasis added), quoting *Moulter v. Grand Rapids*, 155 Mich. 165, 168-169 (1908).

remedy to enforce a liability and submits the state to the jurisdiction of the court, subject to its right to interpose *any lawful defense*."[6]

Since the underlying claim in this case was brought by Plaintiff against the government under the motor vehicle exception,[7] this Court has that jurisdiction allowed by the GTLA over this case and further pursuant to MICH CONST 1963 ART 6, § 4; MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2) and (7); and MCR 7.302(C)(2)(b) and (4)(a).

[6] *Minty v. State of Michigan*, 336 Mich. 370, 393, 381-397 (1953) (emphasis added), citing *Van Antwerp v. State*, 334 Mich. 593 (1952).

[7] *Odom v. Wayne County*, 482 Mich. 459, 478-479 (2008). See also *Mack*, *supra* at 202-203.

COUNTER-STATEMENT OF QUESTION PRESENTED

Amicus curiae agree with the statement of issues presented by the Court. *Amicus curiae* respectfully propose this appeal presents the question of law as follows:

> WHETHER THE "MOTOR VEHICLE" EXCEPTION TO GOVERNMENTAL IMMUNITY, WHICH ALLOWS TORT LIABILITY TO BE IMPOSED ON THE GOVERNMENT FOR THE NEGLIGENT OPERATION OF A GOVERNMENT-OWNED MOTOR VEHICLE AND WHICH LIMITS DAMAGES TO THOSE FOR "BODILY INJURY" AND "PROPERTY DAMAGE", ALLOWS ECONOMIC AND NONECONOMIC DAMAGES TO BE IMPOSED AGAINST THE GOVERNMENT UNDER MICHIGAN'S NO-FAULT INSURANCE ACT?

Plaintiff / Appellee Answers: Yes.

Defendant / Appellant Answers: No.

Court of Appeals Answers: Yes.

Amicus Curiae Answer: No.

STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus curiae Michigan Townships Association (MTA) is a Michigan non-profit corporation consisting of more than 1,230 townships within the State of Michigan (including both general law and charter townships). The MTA provides education, exchange of information, and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the state of Michigan.

MTA's member entities are largely self insured. Each maintain retention amounts which provide primary coverage for claims paid pursuant to § 5 of the GTLA; MCL 691.1405 (the motor vehicle exception). Therefore, to the extent the member entities do provide additional "no-fault" insurance coverage, they bear the primary coverage to insure numerous government-owned and operated motor vehicles. *Amicus curiae* Oakland County, Macomb County and Wayne County are also self-insured entities which provide similar coverage for their respective vehicle fleets.[8]

The motor vehicle exception to governmental immunity allows a claimant to recover "bodily injury" damages, only, for injuries received due to the negligent operation by government personnel of government-owned motor vehicles.[9] Under Michigan's No-Fault Automobile Insurance Act (the No-Fault Act),[10] economic damages in the form of "wage loss"

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[8] Wayne County is self-insured and has excess coverage to provide no-fault insurance coverage. Oakland County and Macomb County both purchase no-fault insurance coverage for their vehicle fleet from a no-fault insurance provider, but maintain a large self-insured retention which is primary to this coverage.

[9] MCL 691.1405.

[10] MCL 500.3101 *et seq*. Specifically, MCL 500.3105(1) provides that "an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." The

and "potential future earnings" damages, *inter alia*, are "no-fault benefits" available to someone injured by the ownership, maintenance, operation, or use of a motor vehicle as a motor vehicle, without regard to fault. Excess "economic benefits" and "noneconomic benefits" are available against an insured third-party tortfeasor under the No-Fault Act. A claimant can usually sue the third-party tortfeasor to recover these excess economic damages and, in certain cases, noneconomic damages.

In the case *sub judice* the Court of Appeals ruled the amount and extent of damages available to a claimant filing suit against a governmental entity under the motor vehicle exception included these no-fault tort damages – excess economic benefits (wage loss and potential lost future earnings).[11] It is the position of *amicus curiae* that such damages are not "bodily injury" damages which arise out of the negligent operation of a government-owned motor vehicle as precisely required by § 5 of the GTLA.

Because the Court of Appeals' decision expands awardable damages against the government under the motor vehicle exception, beyond those which are allowed by the plain language of the GTLA, the only expression of the People's waiver of immunity from suit and liability, the consequences of the ruling is of significant financial and economic importance to *amicus curiae*. "The liability of the [government] is, of course, properly understood as the liability of state taxpayers, because the state and its various subdivisions have no revenue to pay civil judgments, except that revenue raised from the taxpayers."[12] Thus, because the monies

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"benefits" at issue in this case include "work loss" (also referred to as wage loss) benefits under MCL 500.3107, and "excess" work-loss benefits, which may be extended beyond the statutory three-year limitation as provided in MCL 500.3135(3)(c).

[11] *Hannay v. Dep't of Transportation*, 299 Mich. App. 261 (2013).

[12] *Nawrocki v. Macomb County Road Commission*, 463 Mich. 143, 148, n. 1 (2000).

used to pay damages for successful suits brought under the motor vehicle exception must come directly from the taxpayers who provide revenue for government operations, requiring payment for the type of damages awarded in this case would be a direct and palpable drain on the public *fisc* of *amicus curiae*.

This Court has stated that it is "a central purpose of governmental immunity...to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim based on governmental immunity". Thus, it is extremely important for this Court to maintain the Legislature's strictly construed and narrowly applied exceptions to immunity.[13] This includes the remedies available under the GTLA.

As governmental entities that must manage the public costs associated with providing government services, a significant portion of which include exposure to liability under the motor vehicle exception, *amicus curiae* have a substantial interest in the outcome of this case.

[13] *Mack v. City of Detroit*, 467 Mich. 186, 203, n. 18 (2002); *Costa v. Community Emergency Medical Services, Inc.*, 475 Mich. 403, 409-410 (2006).

INTRODUCTION

This case presents the question of whether the motor vehicle exception[14] to governmental immunity *limits* a claimant's remedy to "bodily injury" damages only, or may such a claimant seek *additional* economic and/or noneconomic damages available under the No-Fault Act.[15] *Amicus curiae* herein believe, to the extent the government is subject to the No-Fault Act,[16] that, consistent with this Court's decision in *Wesche v. Mecosta County Rd. Comm'n*,[17] *inter alia*, the GTLA limits the remedy available to a claimant who suffers "bodily injury" arising out of the negligent operation of a government-owned vehicle to only those medical expenses related to physical, corporeal injury to the person of the claimant, i.e., reasonable medical expenses. *Amicus curiae* urge this Court to so hold and reverse the Court of Appeals decision.

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[14] MCL 691.1405.

[15] MCL 500.3101 *et seq.*

[16] *Amicus curiae* submit the proposition that the government is subject to the No-Fault Act is itself a subject of debate given the jurisdictional nature of governmental immunity and the fact that the GTLA "evidences a clear legislative judgment that public and private tortfeasors should be treated differently." *Costa v. Community Emergency Medical Services, Inc.*, 475 Mich. 403, 409-410 (2006), quoting *Robinson v. City of Detroit*, 462 Mich. 439, 459 (2000). If only Michigan's Legislature can expressly waive the pre-existing immunity inherent in government operations, see, e.g., *Michigan State Bank v. Hastings*, 1 Doug. 225, 236 (1844); *Mack v. City of Detroit*, 467 Mich. 186, 198 (2002), then without an *express waiver* demonstrating that the People have consented to submit the government to a system that imposes liability and distributes compensation therefor *without regard to fault* and imposes "damages" beyond those for "bodily injury" in some cases, there appears to be no such consent. Moreover, the only reason ever given for the government's participation in the No-Fault scheme is that the "owner or registrant" of a motor vehicle in the state of Michigan must provide the security required under the No-Fault Act. See, e.g., *Crawford County v. Secretary of State*, 160 Mich. App. 88 (1987); *Trent v. Suburban Mobility Authority for Regional Transportation, et al.*, 252 Mich. App. 247, 251-252 (2002). But, the government's *consent* to be subject to the No-Fault Act appears to be an implied or tacit reading by the courts of this simple requirement in the No-Fault Act. Nothing within the No-Fault Act explicitly waives the government's immunity from suit and expressly subjects the government to *any* liability. See MDOT's Brief, p. 14.

[17] 480 Mich. 75 (2008).

BACKGROUND

The issue in this case implicates the government's inherent immunity from suit and liability, the jurisdictional principle underlying such immunity, and the extent to which a claimant is allowed to access Michigan court's via the Legislature's strictly confined waiver of that immunity in the Governmental Tort Liability Act (the GTLA).[18] The People of Michigan, through the Legislature, vest courts with subject-matter jurisdiction in only a small subset of cases against the government.[19] Otherwise, common-law immunity is retained by the state and its subordinate entities.[20] In Michigan, the GTLA is the *only* mechanism by which the People have waived this inherent, preexisting immunity. The exceptions in the GTLA strictly limit the terms, conditions, and restrictions by which governmental entities may be hailed into Michigan courts to face liability.[21] Compliance with these exceptions is mandatory.[22]

A judicial decision purporting to allow expansion of the limitations defined in the GTLA is *ultra vires* because the preexisting immunity inherent in the operations of these entities has not

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[18] MCL 691.1401 *et seq.*

[19] "Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them". *County Rd. Ass'n of Mich. v. Governor*, 287 Mich. App. 95, 118 (2010), citing *Pohutski v. City of Allen Park*, 465 Mich. 675, 681 (2002). See also *Sanilac County v. Auditor General*, 68 Mich. 659, 665 (1888). *Cf. Mack, supra* at 195 (stating "a governmental agency is immune *unless* the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government" and holding that a claimant must plead *and* prove at the outset that a case will fit within the exception to move beyond the summary disposition stage on a motion under MCR 2.116(C)(7)).

[20] *Greenfield Constr. Co. v. Mich. Dep't of State Hwys.*, 402 Mich. 172, 193, 194 (1978), accord *Pohutski, supra* at 688. See also *Ross v. Consumers Power Co.*, 420 Mich. 567, 596-97 (1984) and *Ballard v. Ypsilanti Township*, 457 Mich. 564, 567-69 and 573-76 (1998) (explaining the history of common law immunity, the Legislature's statutorily created exceptions and the fact that immunity must be expressly waived by statute because Michigan adheres to the jurisdictional view of governmental immunity).

[21] *Nawrocki v. Macomb County Road Comm'n*, 463 Mich. 143, 158 (2000).

[22] *Id.*

been waived – a condition precedent to allowing a court of law to exercise subject-matter jurisdiction over the suit *and* to adjudicate its merits.[23]

Most importantly, for purposes of the case *sub judice* the GTLA limits the remedy available to claimants who are successful in pleading and proving a case in avoidance of the government's suit immunity.[24] This means that only those remedies found in the GTLA itself provide the nature and scope of damages available to such a claimant.[25] A statute that does not expressly provide the government has waived its immunity from suit and subjected itself to liability in a given circumstance cannot be judicially construed to do so. This conclusion is mandated by the Legislature's narrowly drawn exceptions to the broad, inherent and preexisting common-law immunity enjoyed by the government. The No-Fault Act does not even mention the government's immunity from suit or attempt to define any exception thereto.

Contrast this with the No-Fault Act's allowance of imposition of liability without regard to fault.[26] Except in certain circumstances tort liability was abolished by the No-Fault Act.[27]

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[23] *Mack, supra.* "[S]tatutory relinquishment of common law sovereign immunity from suit must be strictly construed." *Greenfield, supra* at 197, citing *Manion v. State Hwy. Comm'r*, 303 Mich. 1 (1942), *cert den'd* at 317 U.S. 677 (1942). See also *Maskery v. Bd. of Regents of Univ. of Michigan*, 468 Mich. 609, 613-14 (2003) (stating "[a]bsent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function"). See MCL 691.1401(b) defining "governmental function".

[24] "Statutory consent to be sued merely gives a remedy to enforce a liability and submits the state to the jurisdiction of the court, subject to its right to interpose any lawful defense." *Minty v. State of Michigan*, 336 Mich. 370, 393, 381-397 (1953), citing *Van Antwerp v. State*, 334 Mich. 593 (1952).

[25] *Scheurman, supra* at 636, n. 28 (1990).

[26] The No-Fault Act mandates that insurers "pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of motor vehicle as a motor vehicle." MCL 500.3105(1). *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 504-05 (1981). See also *Shavers v. Attorney General*, 402 Mich. 554 (1978). See also *Miller v. Farm Bureau Mut. Ins. Co.*, 218 Mich. App. 221, 225-226 (1996).

[27] *Id.* See also *McCormick v. Carrier*, 487 Mich. 180, 189-191 (2010).

Since the GTLA only allows tort liability because of "negligence" under the motor vehicle exception, i.e., liability because of fault, it is beyond the Legislature's or the Judiciary's power to award damages against the government without regard to fault *and* to allow *tort* liability for damages which are not encompassed within the scope of the narrowly defined phrase "bodily injury". Unless the Legislature explicitly waives the government's immunity from tort liability to include such damages, their award will be *ultra vires*.

The No-Fault Act allows a claimant to sue a third-party tortfeasor for noneconomic damages[28] and excess economic benefits damages.[29] However, no construction of the term "bodily injury" in the GTLA, much less the strictest interpretation required of any exception to governmental immunity would encompass these types of damages that are available under the specific statutory scheme that is the No-Fault Act.[30] These damages are not "bodily injury" or "property" damages as contemplated in the motor vehicle exception.[31]

And, to the extent that the negligent operation of a government-owned vehicle is the proved cause of injury, the No-Fault Act and the GTLA are not inconsistent in that they both would allow recovery for "bodily injury" and/or "property" damages.[32] Both technically allow recovery by the injured claimant of damages, limited, as they must be by the GTLA, to "bodily

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[28] *McCormick*, *supra* at 189-190, citing MCL 500.3135(1), which provides: "A person remains subject to tort liability for *noneconomic* loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement".

[29] For a very succinct explanation of the two general types of damages payable under the No-Fault Act as either "no fault benefits" or "tort claim" benefits, see *Great American Ins. Co. v. Queen*, 410 Mich. 73, 93-97 (1980).

[30] *Stanton v. City of Battle Creek*, 466 Mich. 611, 617-618 (2002), citing *Nawrocki*, *supra* at 158 and noting when defining terms in the GTLA the strictest and narrowest definition must be used.

[31] MCL 691.1405.

[32] See *Hardy v. Oakland County*, 461 Mich. 561 (2000).

injury" and "property damage". Any other benefits or damages, available or awardable, respectively, to those injured in motor vehicle accidents under the No-Fault Act and the case law interpreting it, *are not* available or awardable as against a governmental entity.

This is an inexorable conclusion based on the inherent characteristic of the government's immunity from tort liability,[33] the GTLA's narrowly drawn exceptions,[34] and the Legislature's and Court's inability to change the scope of the government's liability and damages without express consent of the People.[35] If it were otherwise, then the purpose of immunity to *limit* the government's liability would be meaningless.

APPLICABLE LAW

A. The Governmental Tort Liability Act, MCL 691.1401 et seq.

The GTLA is described, in its preamble, as:

> AN ACT to make *uniform the liability* of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof...when engaged in the exercise or discharge of a governmental function, *for injuries to property and persons*; *to define and limit this liability*;...[and] to authorize the purchase of liability insurance to protect against loss arising out of *this liability*....[36]

Although preamble language is not authoritative,[37] it has been stated from this language that the purpose of the GTLA was to make the liability of all governmental entities *uniform* and to restrict imposition of liability, i.e., "to define and limit" available remedies, by and through the

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[33] *Mack, supra* at 202. See also *In re Bradley's Estate*, 494 Mich. 367, 389 (2013) (explaining the significance of the phrase "*tort liability*" as used in the GTLA).

[34] *Stanton, supra*; *Nawrocki, supra.*

[35] See footnote 16, *supra.*

[36] Public Act 1964, No. 170, Effective July 1, 1965.

[37] *Nat'l Pride at Work v. Governor of Michigan*, 481 Mich. 56, 79, n. 20 (2008) (internal citations omitted).

GTLA, only.[38] It has also been stated, from this principle, that no other statutory provisions waive the government's suit immunity and provide a remedy as against the government without explicitly providing for same.[39] Thus, the GTLA contains *all* exceptions to the government's preexisting and inherent immunity from *suit* and *liability*.[40] MCL 691.1407 provides:

> "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed."[41]

Thus, only those causes of action enumerated within the GTLA provide an avenue for a claimant to access Michigan courts to pursue a claim against the government. Just as the GTLA provides *all exceptions*, the elements of the causes of action brought against the government must be plead and proved by the claimant within the parameters of those exceptions and their interpretation by this Court.[42] Strict interpretation of the GTLA ensures utmost caution will be exercised by the judiciary in guarding the public *fisc* from being decimated. This is the intent behind governmental immunity.

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[38] *Hadfield v. Oakland County*, 430 Mich. 139, 147 at n. 2 (1988), rev'd on other grounds by *Pohutski*, *supra*.

[39] *Pohutski*, *supra* at 688 (reaffirming the principle in *Hadfield, supra*, and in *Ross*, *supra* at 618, that *all* governmental entities enjoy uniform immunity from *all* tort liability).

[40] *Hadfield*, supra at 147 at n. 2, rev'd on other grounds by *Pohutski*, *supra*.

[41] The immunity from tort liability in this section is "expressed in the broadest possible language – it extends immunity to *all* governmental agencies for *all* tort liability *whenever* they are engaged in the exercise or discharge of a governmental function." *Pohutski*, *supra* at 688, citing Justice Griffin's concurrence in *Li v. Feldt*, 434 Mich. 584, 597-606 (1990) (stating at page 605 that "the fundamental purpose of the act was to restore immunity to municipalities, grant immunity to all levels of government when engaged in the exercise or discharge of a governmental function, and prevent [further] judicial abrogation of governmental and sovereign immunity."). See also *Ross*, *supra* at 618.

[42] *Mack*, *supra* at 202-203.

1. The Jurisdictional Principle of Governmental Immunity

In Michigan, governmental immunity is jurisdictional. Sovereign immunity was a common-law rule that predated Michigan statehood by centuries.[43] The "sovereign" was immune from suit unless it consented to the action against it. Early cases established that the exceptions to sovereign immunity were those provided by positive law, i.e., statutory law.[44]

Historically, there were two rationales for immunity, one "divine" and the other "jurisdictional".[45] The first developed from the rationale that the sovereign, i.e., the king, was "divine", and therefore, above the law. As such, the king could do no wrong and was not answerable in a court of law.[46]

The second reason sprang from the modern concept of the "sovereign" as "the People", who were superior to and creator of the court's authority.[47] Under the American "rendition" of sovereignty, power resides in "the People" and is embodied in their respective constitutions, state and federal, which create, respectively, "a self-limiting people with all of the necessary characteristics of a true sovereign" including, of course, the inherent characteristic of being

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[43] *Ross*, *supra* at 597.

[44] See, e.g., *Michigan State Bank v. Hastings*, 1 Doug. 225, 236 (1844) (the state cannot be sued unless it consents to jurisdiction and an act of the Legislature conferring such jurisdiction on the courts "is the usual mode by which the state consents to submit its rights to the judgment of the judiciary"); *Dermont v. Mayor of Detroit*, 4 Mich. 435, 441 (1857); *City of Detroit v. Blackeby*, 21 Mich. 84, 113, 117 (1870) (Campbell, J.) ("***there is no common law liability*** against [the government] and [it] cannot be sued except ***by statute***") (emphasis added).

[45] *Ross*, *supra* (emphasis added). See also *Ballard v. Ypsilanti Township*, 457 Mich. 564 (1998).

[46] *Ross*, *supra* at 597.

[47] *Id.* at 597-598, citing *Borchard*, Governmental Responsibility in Tort, 36 YALE L J 1, 17-41 (1926); 3 Holdsworth, History of English Law (5th ed), pp. 458-469; Jaffe, Suits Against Government and Officers: Sovereign Immunity, 77 HARVARD L REV 1, 3-4, 19-20 (1963); Prosser, Torts (4th ed), § 131, pp. 970-971.

immune from suit and liability when engaged in the ordinary functions of government.[48] "Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them".[49]

In *Mack v. City of Detroit*, this Court reestablished the important principle that the government's immunity was an inherent, preexisting characteristic of government.[50] The Court corrected the previous erroneous notion that sovereign immunity in Michigan (whether with respect to the state or any and all of its subordinate entities) had been (or could be) *abolished* by the courts and then was somehow *reinstated* by the Legislature.[51] It was ultimately gleaned from the evolution of the case law after *Ross*, that immunity with its jurisdictional roots could not be abolished because it was an inherent characteristic of government.[52] Thus, in *Mack*, after a properly grounded orientation of governmental immunity had been established, the Court explained "it did not take a legislative decree to *create* governmental immunity, but a legislative act to *preserve* the doctrine that this Court had historically recognized as a characteristic of government."[53]

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[48] The Oxford Companion to American Law (Oxford Univ. Press, 2002), p. 757.

[49] *County Rd. Ass'n of Mich. v. Governor*, 287 Mich. App. 95, 118 (2010), citing *Pohutski v. City of Allen Park*, 465 Mich. 675, 681 (2002). See also *Sanilac County v. Auditor General*, 68 Mich. 659, 665 (1888).

[50] *Mack, supra* at 198, 202-203.

[51] *Id.*, referencing *Williams v. City of Detroit*, 364 Mich. 231 (1961).

[52] *Id.*

[53] *Mack, supra* at 202 (emphasis added). *Williams* purported to abrogate common-law immunity – but, in reality it attempted to do so only with respect to municipalities; the Court was evenly split on whether common-law governmental immunity existed. *Pohutski, supra* at 682-83 (Corrigan, J.); and 701 (Kelly, J., dissenting).

The inherent characteristic of immunity is another way of saying that the government's suit immunity is *jurisdictional*. And, as explained in the next section, in order for a court to exercise subject matter jurisdiction over a claim against the government, the claimant must proceed through the *only* conduit by which the government waives this inherent immunity and submits itself to the jurisdiction of the courts – the GTLA.[54] An understanding of the jurisdictional principle of governmental immunity is critical to analyzing whether any other *common law* or *statutory* provision can waive the government's suit immunity and expose it to a liability for damages that are without the confines of the Legislature's waiver.

2. Legislative Waiver of Governmental Immunity Can Only Occur Through the GTLA

From the jurisdictional principle of governmental immunity it follows that courts are without subject-matter jurisdiction to entertain actions against the government unless such jurisdiction is conferred by express (or positive) law and in strict adherence thereto.[55] "It is well settled that a circuit court is without jurisdiction to entertain actions against the state of Michigan unless the jurisdiction shall have been acquired by legislative consent."[56]

"Legislative waiver of a state's suit immunity merely establishes a remedy by which a claimant may enforce a valid claim against the state and subjects the state to the jurisdiction of the court."[57] There must be compliance with the limitations and requirements that the Legislature has established to subject a governmental agency to the jurisdiction of Michigan

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[54] See *Scheurman v. Dep't of Transportation*, 434 Mich. 619, 636, n. 28 (1990) "In Michigan, the governmental immunity act is the vehicle that provides safeguards against unwarranted liability." See also *Atkins v. Suburban Mobility Authority for Regional Transp.*, 492 Mich. 707, 714, n. 11 (2012) (emphasis added), quoting *Moulter v. Grand Rapids*, 155 Mich. 165, 168-169 (1908).

[55] *Greenfield, supra* at 193-197; *Hastings, supra* at 236; *Blackeby, supra* at 113, 117.

[56] *Greenfield, supra* at 194.

[57] *Id.* at 193. See also *Minty, supra* at 393, 381-397; *Van Antwerp, supra.*

courts. Unless this precondition is fulfilled, the immunity from suit and liability inherent in the operations of that agency will not have been waived.[58]

In the case *sub judice*, there is no express legislative waiver of the government's immunity from suit and liability within the provisions of the No-Fault Act.[59] Thus, the only reference for assessing the government's potential tort liability to a person injured in a motor vehicle accident is the GTLA itself.[60]

3. Statutory Interpretation and the GTLA

When this Court reviews interpretation of legislative provisions, its primary goal is to consider whether the reviewing court properly discerned the Legislature's intent as expressed in the statute's language.[61] In doing so, it is the Court's "duty to accept [a] statute as expressing the will of our people and to give it complete effect."[62] "[T]he courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives."[63] "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written."[64]

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[58] *Id.* at 197, citing *Manion, supra.*

[59] *Ballard v. Ypsilanti Township*, 457 Mich. 564, 568 (1998) ("[I]mmunity is waived only by legislative enactment.").

[60] *Scheurman, supra.*

[61] *Grimes v. Mich. Dep't of Transp.*, 475 Mich. 72, 76 (2006), citing *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402 (2000).

[62] *Knight Morley v. Mich. Employment Security Comm'n*, 350 Mich. 397, 417 (1957).

[63] *Rowland v. Washtenaw County Road Comm'n*, 477 Mich. 197, 214, n. 10 (2007).

[64] MCL 8.3a; *Robertson v. Daimler Chrysler Corp.*, 465 Mich. 732, 748 (2002).

The meaning of the Legislature "is to be found in the *terms and arrangement* of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense."[65] Statutory language should thus be given a reasonable construction "considering the provision's purpose and the object sought to be accomplished."[66]

Additionally, when parsing a statute, it is to be presumed "every word is used for a purpose" and effect will be given "to every clause and sentence."[67] Therefore, courts are to avoid an interpretation that makes any part of a statute surplusage or nugatory.[68] Further, a court "may not assume that the Legislature inadvertently made use of one word or phrase instead of another."[69] Arbitrary substitution of words and phrases in a statute to fit a different meaning or to attribute a greater or lesser significance to the provision is prohibited.[70]

It follows that a court may not impose its own policy choices when interpreting a statute.[71] "[C]ourts may not rewrite the plain statutory language and substitute [its] own policy decisions for those already made by the Legislature."[72] In short, a court has no authority to add words, conditions or restrictions to a statute.[73] The ordinary rules of statutory interpretation are further supplemented when addressing interpretation of the provisions of the GTLA.

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[65] *Gross v. General Motors Corp*, 448 Mich. 147, 160 (1995) (emphasis added).

[66] *Michigan Humane Society v. Natural Resource Comm'n*, 158 Mich. App. 393, 401 (1987).

[67] *Pohutski, supra* at 683.

[68] *Id.* at 684.

[69] *Robinson v. City of Detroit*, 462 Mich. 439, 459 (2000).

[70] *Pohutski, supra* at 687-688, 688.

[71] *People v. McIntire*, 461 Mich. 147, 152 (1999).

[72] *Rowland, supra*, citing *Mayor of Lansing v. Michigan Public Service Comm'n*, 470 Mich. 154, 167 (2004).

[73] *Id.*

a. Special Rules of Interpretation Apply to the Provisions of the GTLA

The Court of Appeals interpreted § 5 of the Governmental Tort Liability Act (GTLA), MCL 691.1405, also known as the "motor vehicle exception" to governmental immunity. "With respect to the GTLA, [this Court's] duty is to interpret the statutory language in the manner intended by the Legislature which enacted [the GTLA]."[74] Thus, in construing the GTLA, "courts may not speculate about an unstated purpose," *e.g.*, an overly *broad* application of a statutory exception, "where the unambiguous text plainly reflects the intent of the Legislature."[75] "[S]tatutory relinquishment of common law sovereign immunity from suit must be strictly construed."[76]

Specific provisions in the GTLA prevail over general statements in other parts of the statute.[77] The GTLA provisions granting immunity are broadly construed and the exceptions thereto are narrowly drawn.[78] As a result, "[t]here must be strict compliance with the *conditions* and *restrictions* of the [GTLA]."[79] In 1986, "the Legislature put its imprimatur on this Court's giving the exceptions to governmental immunity a narrow reading."[80]

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[74] *Reardon v. Dep't of Mental Health*, 430 Mich. 398, 408 (1988), citing *Hyde v. Univ. of Mich. Bd. of Regents*, 426 Mich. 223, 244 (1986).

[75] *Gladych v. New Family Homes, Inc.*, 468 Mich. 594, 597 (2002), citing *Pohutski*, *supra* at 683.

[76] *Id.* See also *Pohutski*, *supra*; *Nawrocki*, *supra*.

[77] *Jones v. Enertel Inc*, 467 Mich. 266, 270 (2002).

[78] *Nawrocki*, *supra* at 158.

[79] *Id.* (emphasis added). See also *Scheurman v. Dep't of Transportation*, 434 Mich. 619, 629-630 (1990).

[80] *Id.* at n. 16. The principle of statutory construction that requires strict or narrow interpretation of certain statutes has a distinguished pedigree as applied to exceptions to governmental immunity. 3 Sands, Sutherland Statutory Construction (4th ed.), § 62.01, p. 113 (stating that "the rule has been most emphatically stated and regularly applied in cases where it is asserted that a

b. The Jurisprudential Theme in Addressing Governmental Immunity Cases

Finally, and perhaps most important, this Court has developed a theme in addressing the overarching public policy concerns and importance of governmental immunity. As such, this Court strives for the following: (1) to faithfully interpret and define the GTLA "to create a cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability"; (2) to "formulate an approach which is faithful to the statutory language and legislative intent"; and (3) develop a consensus of "what the Legislature intended the law to be" in the realm of governmental immunity.[81]

This Court has also noted the GTLA "evidences a clear legislative judgment that public and private tortfeasors should be treated differently."[82] As noted by this Court:

> The problems involved in drawing standards for governmental liability and governmental immunity are of immense difficulty. Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private

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statute makes the government amenable to suit" and "the standard of liability is strictly construed even under statutes which expressly impose liability"). The rule is not so much one of statutory interpretation as it is one of deference to the inherent characteristic of immunity and the closely guarded relinquishment thereof by the sovereign. *Manion v. State Hwy. Comm'r*, 303 Mich. 1 (1942), *cert den'd Manion v. State of Michigan*, 317 U.S. 677 (1942). See also *United States v. Sherwood*, 312 U.S. 584, 590 (1941) (the government's consent to be sued is a relinquishment of sovereign immunity and must be strictly interpreted); *Shillinger v. United States*, 155 U.S. 163, 166, 167-168 (1894) ("the congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted"; "[b]eyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government"; this is "a policy imposed by necessity").

[81] *Nawrocki, supra* at 148-149.

[82] *Costa v. Community Emergency Medical Services, Inc.*, 475 Mich. 403, 409-410 (2006), quoting *Robinson v. City of Detroit*, 462 Mich. 439, 459 (2000).

> persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.[83]

Applying these principles of interpretation and application of the GTLA, this Court has developed a well-established jurisprudence concerning interpretation and application of the GTLA.

4. The Motor Vehicle Exception to Governmental Immunity

These aforementioned dictates govern a court's interpretation and application of the motor vehicle exception. MCL 691.1405 provides: "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner...."[84] In *Wesche*, the Court held that the term "bodily injury" was restricted to damages arising out of physical, corporeal injury to the body.[85] In other words, the term was confined to the medical expenses associated with the recuperation and rehabilitation arising from physical injury to the body.[86] The Court implied that noneconomic damages under the No-Fault Act were also not "bodily injury" damages that would be available in a tort action against the government.[87]

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[83] *Scheurman v. Dep't of Transp.*, 434 Mich. 619, 637 (1990), citing *Ross*, *supra* at 618-619.

[84] MCL 691.1405 (emphasis added).

[85] *Wesche v. Mecosta County Rd. Comm'n*, 480 Mich. 75, 84-85 (2008).

[86] *Id.* at 85.

[87] *Id.* at 86.

Importantly, the Court also addressed the question whether the Wrongful Death Act,[88] which provided for other noneconomic damages, i.e., loss of consortium against a negligent tortfeasor, trumped or otherwise expanded the damages available under the motor vehicle exception for "bodily injury".[89] The Court held that the Wrongful Death Act did not because the government *waived* its preexisting and inherent suit immunity for only *two* types or "categories" of damages: bodily injury and property damage.[90] The Court held the statutory Wrongful Death Act could not expand the waiver of immunity in the GTLA.[91] This serves as an important illustration of the fact that regardless of what other causes of action, liabilities, or damages other statutory provisions provide for, only those specific ones enumerated in the GTLA are viable when addressing the government's liability.

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[88] MCL 600.2922(1).

[89] *Wesche*, *supra* at 87-88.

[90] *Id.*

[91] *Id.*

B. Michigan's No-Fault Act, MCL 500.3101 et seq.

1. General Purpose of the No-Fault Act

The No-Fault Act was passed as a part of comprehensive state legislation known as Tort Reform.[92] The purpose of the No-Fault Act was to curtail rampant abuse of the judicial system to secure large and multiple (often overlapping) payouts from insurance companies and individuals on less than certain, and often frivolous, claims and allegations.[93] The cumulative effect of these windfalls was to create higher insurance premiums, which in turn threatened the very fabric of the insurance system upon which society relied as a protection from catastrophic loss and hazard.[94]

As a compromise, the No-Fault Act required the provision of minimum amounts of insurance to be secured by motorists and in exchange, tort liability was abolished, with the very explicit and specific exceptions noted in the act, only. Compulsory insurance provided benefits to victims as a substitute for their common-law remedy in tort.[95] The No-Fault Act's self-insurance concept is rooted in the self-help principle "*sic utere tuo ut alienum non laedas*" (use your own so you do not injure that of another).[96]

Importantly, after explicitly and broadly abolishing all tort liability, the No-Fault Act retains only certain causes of action allowing for additional liability, and limits the amounts of damages recoverable for those common-law torts that have been abolished. Most notably, MCL 500.3135(1) provides that "[a] person *remains subject to tort liability* for noneconomic loss

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[92] *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 504-05 (1981).

[93] *Id.*

[94] *Id.*

[95] *Id.*, see also *Shavers v. Attorney General*, 402 Mich. 554 (1978).

[96] *Shavers*, *supra* at 596, citing 16 Am Jur 2d, Constitutional Law, § 267, p. 523.

caused by his or her ownership, maintenance or use of a motor vehicle *only if* the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." (emphasis added). This is an exception to the general abolition of tort liability.[97] Also, part of these third-party benefits are "excess" economic loss benefits. The latter, as explained below, are the "damages" at issue in the instant case.

The intent of the Legislature, inferable from the face of MCL 500.3135 is clear: the catastrophically injured and the victim of extraordinary economic loss are allowed compensation *in addition to* that provided in MCL 500.3107 (wage loss and medical care expenses) and MCL 500.3110 (dependent care expenses).[98] Otherwise, tort liability was abolished.[99]

Economic damages include wage (or work) loss benefits, certain replacement services, funeral expenses, etc. The Legislature further divided an injured person's economic loss into two categories: loss for which the no-fault insurer is liable (first-party benefits) and loss for which the third-party tortfeasor is liable (third-party benefits).[100]

An insured collects limited economic-loss benefits (work loss (or wage loss), replacement services, and medical and funeral expenses) from his or her no-fault insurer, without regard to fault.[101] An insured may also sue the negligent tortfeasor for *excess* economic-loss benefits.[102] The right of action against the tortfeasor for excess economic loss exists in all categories in which the insurer's liability is limited by statute: work loss, funeral costs, and replacement

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[97] *Citizens Ins. Co. of America v. Tuttle*, 411 Mich. 536, 548 (1981).

[98] *Workman v Detroit Automobile Inter-Insurance Exchange*, 404 Mich. 477, 508-09 (1979).

[99] *Shavers, supra.*

[100] *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 61-62 (1980).

[101] MCL 500.3105(2); MCL 500.3107. See also *Bradley, supra.*

[102] MCL 500.3135(2)(c).

services.[103]

An insured may also sue the negligent tortfeasor for noneconomic damages provided the insured prove what is known as a "threshold injury".[104] Noneconomic damages include pain and suffering, "survivor's benefits" damages, emotional distress damages, loss of consortium damages, etc.

The No-Fault Act addresses both economic and noneconomic damages suffered by a person injured as the result of the ownership, operation, use or maintenance of a motor vehicle as a motor vehicle. Claims are often separated by the nominations "first-party" benefits claims and "third-party" tort claims. "First party" benefits claims are processed with the injured person's own insurer.[105] Third-party tort claims seek benefits, or tort damages, from others whose negligent ownership, operation, use, or maintenance of a motor vehicle as a motor vehicle caused or contributed to the claimant's injuries.

As noted, medical expenses remain the responsibility of the first-party insurer, i.e., the injured claimant's own no-fault insurer.[106] In other words, the injured party may look only to his no-fault insurer to pay for medical expenses incurred as the result of an accident. The generous benefits available to claimant under the no-fault act include all expenses incurred for medical care, recovery and rehabilitation as long as the service, product, or accommodation is reasonably

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[103] *State Farm Mutual Automobile Ins. Co. v. Ruuska*, 412 Mich. 321, 345 (1982).

[104] MCL 500.3135(1). See also *McCormick v. Carrier*, 487 Mich. 180, 189-191 (2010).

[105] See *Johnson v.* Recca, 492 Mich. 169, 173 (2012). "Under the no-fault automobile insurance act, MCL 500.3101 *et seq.*, insurance companies are required to provide first-party insurance benefits, referred to as personal protection insurance (PIP) benefits for certain expenses and losses." MCL 500.3107; MCL 500.3108.

[106] *Swantek v. Automobile Club of Michigan Ins. Group*, 118 Mich. App. 807, 809 (1982); *State Farm, supra.*

necessary and the charge is reasonable.[107] There is no monetary limit on such expenses, and this entitlement can last for the person's lifetime.

An injured person is also entitled to recover up to three years of earnings loss, i.e., loss of income from work that the person would have performed had he or she not been injured.[108] This latter benefit is subject to a "cap" for thirty-day periods, adjusted annually for cost of living changes. An injured person may file a tort claim *against the party at fault* seeking to recover *excess* economic loss (wage loss and replacement expenses beyond the daily, monthly, and yearly maximum amounts).[109] An injured person can also recover from his own insurance company up to twenty dollars a day for up to three years in "replacement services", i.e., expenses reasonably incurred in obtaining ordinary and necessary services that the injured person would otherwise have performed.[110] These are generally known as "no fault economic loss benefits".

In the case *sub judice*, the court of claims ruled Plaintiff was entitled to excess economic loss benefits, an amount for lost (or unrealized) potential future earnings, and noneconomic damages. The Court of Appeals affirmed this ruling, despite MDOT's argument that these were not "bodily injury" damages. The net effect of MDOT's position is that the first-party insurer would always be at least primarily responsible for the injured claimant's medical expenses, i.e., his or her "bodily injury" damages, and, the government would never be liable for any of those other excess economic damages, and noneconomic damages that might be available against a traditional "third-party" tortfeasor, because none of these other damages are "bodily injury" damages. This is in fact the conclusion mandated by the GTLA.

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[107] See MCL 500.3107(1)(a).

[108] MCL 500.3107(1)(b).

[109] MCL 500.3135(3)(c).

[110] MCL 500.3107(1)(c).

ARGUMENT AND ANALYSIS

I. TO THE EXTENT THE GOVERNMENT IS REQUIRED TO PROVIDE COVERAGE UNDER THE NO-FAULT ACT FOR ITS MOTOR VEHICLES, THE GTLA'S NARROW EXCEPTION TO IMMUNITY FOR "BODILY INJURY" CAUSED BY NEGLIGENT OPERATION OF A GOVERNMENT-OWNED MOTOR VEHICLE RESTRICTS DAMAGES AVAILABLE TO A CLAIMANT PLEADING A SUCCESSFUL CAUSE OF ACTION AGAINST THE GOVERNMENT UNDER THE EXCEPTION

A. Standard of Review

The Court of Appeals based its decision on the trial court's ruling on a motion brought by MDOT pursuant to MCR 2.116(C)(7). Rulings on such motions are reviewed *de novo* by this Court.[111] MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.[112] The Court of Appeals interpreted MCL 691.1405 of the GTLA. Review of its interpretation is also *de novo*.[113]

B. Analysis

Assuming, without conceding, that the No-Fault Act even applies to governmental entities, i.e., that governmental entities must participate in the no-fault insurance system, the No-Fault Act does not *trump* the GTLA in terms of dictating either the nature *or* scope of damages available in a case in which a claim is perfected under the motor vehicle exception. Only the Legislature's *express* consent to submit the government to suit confers the jurisdiction and authority to determine the government's liability. This has been the case since sovereign

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[111] *Maiden v. Rozwood*, 461 Mich. 109, 118 (1999).

[112] *Haliw v. Sterling Heights*, 464 Mich. 297, 301-302 (2001), quoting *Glancy v. Roseville*, 457 Mich. 580, 583 (1998).

[113] *Maiden, supra* at 119. See also *Mitan v. Campbell*, 474 Mich. 21, 23 (2005).

immunity. This means that courts cannot create liability where none exists in the plain expression of the Legislature's express consent on behalf of the People.[114] This is the only means by which tort liability can be imposed.[115]

Moreover, the *absence* of such acquiescence cannot be deemed by a court as silent acceptance of the surrender of the People's immunity. If such acquiescence is to stand, it must be clearly expressed in the legislation that allows it. To that end, the No-Fault Act says nothing of the government's immunity from tort liability.[116] In fact, the No-Fault Act nowhere explicitly subjects the government to its provisions, whether addressing "tort liability" or liability "without regard to fault".

There is overlap. The government is liable for "bodily injury" damages when a claimant proves his or her injuries arose out of the negligent operation of a motor vehicle. The No-Fault Act retained "tort liability" but allows for more than just "bodily injury" damages. Thus, noneconomic damages against a third-party tortfeasor (who is not a governmental employee operated a government-owned vehicle) are also available for certain "threshold injuries" proved under the No-Fault Act.[117] But, such damages are not "bodily injury" damages.[118]

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[114] *Mack*, 467 Mich. At 195, 198, 202-203.

[115] *In re Estate of Bradley, supra.*

[116] MDOT's Brief, p. 14.

[117] *Hunter v. Sisco*, 300 Mich. App. 229 (2013), application for leave to appeal denied 839 N.W.2d 202 (2013), motion for reconsideration pending. See also *Hodges ex rel Estate of Hodges v. City of Dearborn*, Unpublished Decision of the Michigan Court of Appeals, dated May 14, 2013 (Docket No. 308642) (pain and suffering, negligent infliction of emotion distress, emotional distress damages not available noneconomic tort damages as against the government under the motor vehicle exception to governmental immunity, citing *Hunter, supra*), leave to appeal denied 838 N.W.2d 697 (2013).

[118] *Id.* See also *Wesche, supra* at 84-87.

The term "bodily injury" is not ambiguous so judicial construction *or expansion* is not allowed.[119] As it is an aspect of liability that may be imposed on the government, it must be interpreted in its strictest sense because the exceptions to immunity and liability are narrowly drawn.[120] The retained-unless-surrendered nature of governmental immunity (the inherent characteristic of governmental immunity), the jurisdictional principle, and the interpretive principles espoused by this court, all warrant interpreting the phrase "bodily injury" as narrowly as possible in an effort to *limit* the government's liability.[121]

The no-fault act contains no such expression. The GTLA, on the other hand, does, but it is limited to bodily injury. Indeed, when addressing the apparent conflict between the No-Fault Act and the GTLA, this Court held in *Hardy v. Oakland County*,[122] that the "restrictions set forth in the no-fault act control the broad statement of liability found in the immunity statute."[123]

However, this does not mean the converse is true. Here, the Court is called upon to determine the scope of liability in the GTLA vis-à-vis other damages that may be available in the No-Fault Act. The Court is not writing on a clean slate. In *Wesche*, the Court implied that no other types of damages are available whether or not they are common law remedies or statutory remedies. And, the Court referred directly to the noneconomic damages available under the No-Fault Act, stating:

> The no-fault act thus retains "tort liability for noneconomic loss" if one of the required categories of damage is established. By

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[119] MCL 8.3a; *Robertson v. Daimler Chrysler Corp.*, 465 Mich. 732, 748 (2002).

[120] *Stanton v. City of Battle Creek*, 466 Mich. 611, 617-618 (2002), citing *Nawrocki*, *supra* at 158.

[121] *Id.*

[122] 461 Mich. 561 (2000).

[123] *Id.*

> contrast, *the motor-vehicle exception contains no such language*. It merely provides that governmental agencies "shall be liable for bodily injury and property damage" and says *nothing* to suggest that a separate cause of action, such as one for loss of consortium, may be asserted once a threshold of "bodily injury" has been met.[124]

The No-Fault Act represented only a partial abolition of tort liability. That liability, however, is different when addressing the immunity of the state and its subordinate entities.[125] Public and private tortfeasors are treated differently.[126] As they should be.

As recently as 2012, this Court noted that claims asserting negligence for liability in tort under the exceptions to governmental immunity are *qualitatively different* than claims for benefits without regard to fault.[127] It is difficult to understand how the government, with its inherent immunity and the retained-unless-surrendered nature thereof could implicitly acquiesce to be held liable without regard to fault, i.e., to be subjected to the exact same duties and liabilities provided for in the no-fault act with respect to first-party benefits, when it takes an explicit legislative waiver of governmental immunity to even allow a court of law to assert jurisdiction over the governmental entity and the successful claimant must fulfill the strictly construed and narrowly interpreted *exceptions*.[128]

To be sure, the government also bears its share of "first-party" claims. For example, when a passenger of a government vehicle is injured in a motor vehicle accident, the passenger is entitled to seek payment from the government for those first-party no-fault benefits. When the

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[124] *Wesche*, *supra* at 86 (emphasis added).

[125] *Costa*, 475 Mich. at 409-410.

[126] *Id.*

[127] *Atkins*, 492 Mich. at 718.

[128] *Id.* at 714, n. 11.

negligent operation of the same government owned vehicle causes injury to someone in another vehicle, the latter receives first-party no-fault benefits from his or her own insurer. That he or she cannot receive excess economic benefits (those benefits at issue in this case) or noneconomic "threshold injury" benefits from the government (those at issue in cases like *Hunter*[129] and *Hodges*[130]), is simply a consequence of the proper *a priori* application of the government's inherent and preexisting immunity from tort liability,[131] and the narrowly drawn exception which allows for payment of "bodily injury" and "property damages", *only*.[132] It does not deprive the injured person of a remedy. And, as against the government, recovery for bodily injury and property damage is the only remedy available.[133]

The only exceptions to the government's immunity from liability exist in the GTLA. Thus, even when the No-Fault Act addressed a compromise between pre-existing common-law causes of action, abolished most such actions, and instituted statutorily based remedies and liabilities, it had to assume the pre-existing immunities that existed first, at common law, and then by virtue of the Legislature's *affirmation* of the government's common-law immunity with the few statutory exceptions in the GTLA.[134]

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[129] 300 Mich. App. 229 (2013).

[130] *Hodges ex rel Estate of Hodges v. City of Dearborn*, Unpublished Decision of the Michigan Court of Appeals, dated May 14, 2013 (Docket No. 308642).

[131] *In re Estate of Bradley*, *supra*.

[132] MCL 691.1405.

[133] *Minty*, 336 Mich. at 393, 381-397 (1953), citing *Van Antwerp v. State*, 334 Mich. 593 (1952).

[134] *Id.*, see also MCL 691.1407.

Appellee's counsel argues that MCL 691.1405 does not even apply and that MCL 500.3135 is *the only* provision to be looked at.[135] This argument is based on the oft-cited language in the No-Fault Act "*notwithstanding any other provision of law...*"[136] But, the People's prerogative in dictating to courts of law if, and then how, governmental entities can even be brought before the judiciary to answer for claims against them, i.e., the *jurisdictional* principle of governmental immunity, *precludes* the exercise of statutory authority over the government's liability by any other form than that which is expressly described in and provided for by the GTLA.

The GTLA was promulgated with this language in 1965. The No-Fault Act was passed into law in 1973. A purely chronological analysis might suggest the later in time provision would have had to consider the GTLA and, notwithstanding it, and its exclusivity provision, the No-Fault Act applies. But this ignores the *true jurisdictional nature* of governmental immunity and the fact that the GTLA *is the only avenue* through which the courts must pass to impose liability on the government.

Amicus curiae respectfully suggest, if anything, the opposite is the case. The GTLA in fact *only* applies to the question of liability and damages available to a party injured by the negligent operation of a motor vehicle within the meaning of the motor vehicle exception. To the extent the government participates in and provides coverage under the No-Fault Act, its *liability* for damages is still restrained by the absence of any explicit legislation allowing more to be sought in actions against the government.

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[135] Plaintiff-Appellee's Brief, pp. 28-32.

[136] MCL 500.3135(2); *Hardy v. Oakland* County, 461 Mich. 561 (2000).

In fact, no legislative or judicial act can determine the scope of available damages in an action against the government except those provisions through which the sovereign, i.e., the People, speaking through the Legislature, have acquiesced to be hailed into a court of law.[137] Recently, this Court stated "[i]f the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable."[138]

While it may be that the government must provide an albeit limited *security* under the no-fault act, although *amici* would not concede the point, without some express articulation by the Legislature, the *damages* available against the government must be limited to the absolute minimum that could be sought in contravention of the government's inherent immunity. At least, in the instant case, this is readily ascertainable. Liability for negligent operation of a motor vehicle is limited to "bodily injury" and "property damage", period. This Court has said as much in interpreting both the common-law damages in a loss of consortium claim, and the statutory provisions of the Wrongful Death Act.[139] In both cases, the Court held the GTLA was the origin and the only source of any remedy.

Perhaps the Legislature could expressly articulate the government, rather than a first-party insurer is also bound by the No-Fault Act to the extent it requires payment for bodily injury damages and property damages, only, but it has not. Perhaps, the first-party insurer could seek to hold the government liable for the "bodily injury" damages, only, which are caused by the negligent operation of a government-owned vehicle, the same as it might seek to hold an

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[137] *Scheurman v. Dep't of Transportation*, 434 Mich. 619, 636, n. 28 (1990).

[138] *In re Bradley's Estate*, 494 Mich. 367, 389 (2013).

[139] *Wesche, supra* at 84-85 and 86-89.

"employer" liable for injury incurred by an "employee" in a motor vehicle accident on the assumption that the Workers' Disability Compensation Act is the primary payor for the medical expenses arising out of an automobile accident.[140]

However, as this Court must abide by the terms, conditions, and restrictions in the GTLA, it can only render an interpretation consistent with the Legislature's expressions in *that act*. The "wage loss" and "lost earning" damages, among others, that were sought in this case under the No-Fault Act are not authorized by the plain language of the GTLA. The Court must defer to the latter statute as it is alone the explicit means by which the People have assented when and to what extent the government can be liable.

The government's liability is therefore limited to "bodily injury" and "property damage" as allowed under the GTLA in MCL 691.1405. This is the interpretation that best comports with the Legislature's jealously guarded waiver of immunity on behalf of the People.

[140] *Great American Ins. Co. v. Queen*, 410 Mich. 73, 93-97 (1980); MCL 500.3116.

CONCLUSION

Because of the jurisdictional principle of governmental immunity that controls in Michigan, and the retained-unless-explicitly surrendered nature of that immunity, the default *must always be* that claims and damages against the government *not explicitly provided for* are not allowed. The Legislature waived immunity from suit and liability. It limited liability under the motor vehicle exception to "bodily injury" and "property damage". The compensation for these two injuries can be limited to the compensation required for medical care in the case of bodily injury and the cost of replacement for property damage. Any noneconomic, or excess economic consequential damages that flow from or result from the "bodily injury" or "property damage" are simply not recoverable.

Amicus curiae submit this is the inexorable conclusion of applying the GTLA, and only the GTLA, to the question of the government's liability under the motor vehicle exception. Bodily injury damages are limited to medical expenses associated with the physical, corporeal injury to the person who is injured by the government's *negligent* operation of a motor vehicle.

Given the legislature's authority to declare when the government can be hailed into court and answer in payment of damages to a claimant, the courts are without authority to alter this inherent characteristic of the government's immunity. The solution is, at this point and absent corrective legislation, to require motorists to prove *negligence* as is always required under the motor vehicle exception and to allow the motorist to recover bodily injury damages incurred as a result of that negligence; nothing more or less than what is allowed by the GTLA and the motor vehicle exception. If the "medical expense" damages are paid to that injured claimant by that injured claimant's no-fault insurer as a result of the effect of the No-Fault Act, then that insurer might seek to be subrogated to the rights of the insured for the "bodily injury" damages.

This is consistent with the GTLA, the No-Fault Act, and the common-law jurisprudence (from this Court) governing these separate statutes and their interplay. And, *amicus curiae* respectfully submit, this is all the Court can do without express legislative authority to expand or modify the government's suit immunity and those liabilities which the People have consented to be responsible for through the GTLA. That it forecloses recovery of benefits that may be available in cases not involving government defendants is a natural consequence of its function.

WHEREFORE, *amicus curiae* herein urge this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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